Supreme Court, U.S.
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

FRIENDS OF THE EARTH, et al.,
Petitioners,

v.

LAIDLAW ENVIRONMENTAL SERVICES (TOC), INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a citizen suit seeking civil penalties under Section 505 of the Clean Water Act is constitutionally moot under *Steel Co. v. Citizens for Better Environment*, 118 S. Ct. 1003 (1998), due to lack of redressability, where plaintiffs had standing at the time of the complaint and have shown continuing injury-in-fact but have not obtained injunctive relief.

2. Whether a citizen suit seeking civil penalties under Section 505 of the Clean Water Act is constitutionally moot under *Steel Co.*, due to lack of redressability, when the district court has rendered a declaratory judgment as to liability and the issue of liability was contested.

3. Whether plaintiffs could not be awarded attorneys' fees or litigation costs because the case was dismissed for mootness, even if the litigation was responsible for bringing the defendant into compliance with the Clean Water Act.

PARTIES TO THE PROCEEDING

The plaintiffs are Friends of the Earth, Citizens Local Environmental Action Network, Inc. ("CLEAN"), and the Sierra Club. The defendant was Laidlaw Environmental Services (TOC), Inc., now Safety-Kleen (Roebuck), Inc.

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PETITION FOR A WRIT OF CERTIORARI

Plaintiffs petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the court of appeals was published at 149 F.3d 303 (4th Cir. 1998) and is reprinted in the Appendix ("App.") at 1a. The standing decision of the district court was unpublished. The preclusion decision of the district court was published at 890 F. Supp. 470 (D.S.C. 1995). The relief decision of the district court was published at 956 F. Supp. 588 (D.S.C. 1997).

JURISDICTION

The judgment of the court of appeals was entered on July 16, 1998 (App. 3a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). 28 U.S.C. 2403(a) applies to this action. The court of appeals did not certify this action pursuant to 28 U.S.C. 2403(a).

On October 7, 1998, plaintiffs were granted an extension of time to file their petition for a writ of certiorari.

STATUTES INVOLVED

The relevant sections of the Federal Water Pollution Control Act, 33 U.S.C. 1365(a), 1365(d), 1365(g), and 1319(d) are set forth in the Appendix at 10a.

STATUTORY BACKGROUND

Section 301(a) of the Clean Water Act, 33 U.S.C. 1311(a), states:

> Except as in compliance with this section and sections 302, 306, 307, 318, 402 and 404 of this act, the discharge of any pollutant by any person shall be unlawful.

"The Act makes unlawful the discharge of any pollutant into navigable waters except as authorized by specific sections of the Act." *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.* 484 U.S. 49, 52 (1987). The Act provides for the issuance of discharge permits. 33 U.S.C. 1341-1345. Compliance with a permit issued pursuant to one of the permit programs established by the Act is deemed compliance with Section 301 of the Act and allows discharges which would otherwise be unlawful. *See* 33 U.S.C. 1342(k), 1344(p). Conversely, noncompliance with a permit constitutes noncompliance with Section 301 and is a violation of the Act.

Section 402(a) of the Act, 33 U.S.C. 1342(a), provides for the issuance of Natural Pollutant Discharge Elimination System ("NPDES") permits to allow the discharge of wastewater. The Act requires each NPDES permit to: (a) include discharge limitations; (b) require the permittee to be in compliance with the discharge limitations

in the permit; and (c) require the permittee to monitor its discharges as the United States Environmental Agency ("EPA") requires and report the results accurately to EPA and the state in its discharge monitoring reports ("DMR's"). 33 U.S.C. 1342.

Section 505(a) of the Act, 33 U.S.C. 1365(a) (App. 10a), allows any "citizen" to bring suit to enforce any limitation in an NPDES permit. That section specifically authorizes the courts to issue injunctive relief and impose civil penalties. Section 505(g), 33 U.S.C. 1365(g) (App. 11a), defines citizen as "a person or persons having an interest which is or may be adversely affected."

STATEMENT OF THE CASE

Defendant Laidlaw operates a hazardous waste incinerator. 956 F. Supp. at 593. As part of its operation, Laidlaw discharges wastewater into the North Tyger River pursuant to the NPDES permit issued by the South Carolina Department of Health and Environmental Control ("DHEC"). *Ibid.* The applicable permit limited the discharge of specified pollutants, including mercury, lead, nickel, arsenic, cadmium, chromium and zinc. *Ibid.* It also required Laidlaw to monitor its discharge and report the level of pollutants discharged to EPA and DHEC. *Ibid.* From January 1986 through January 1995, Laidlaw violated its permit limitation for mercury 489 times. 956 F. Supp. at 613-621. Laidlaw also violated its non-mercury metals discharge limitations and its pH limitation 439 times. J.A. 380-392. In addition, it violated the monitoring requirements of its permit 420 times and the reporting requirements 503 times. 956 F. Supp. at 610.

Laidlaw's discharge violations were due to an inadequate treatment system and its failure to control

adequately its mercury feed rate, i.e., the amount of mercury in the waste fed into the incinerator. 890 F. Supp. at 478. Laidlaw gradually added treatment equipment from 1987 to 1991. *Id.* at 482. The Lancy system, installed in 1991, corrected most of Laidlaw's non-mercury metals violations. *Id.* at 483. However, Laidlaw's mercury violations increased in early 1992. Laidlaw violated its mercury limitation 103 times from January 1992 through May 1992, the period immediately prior to the filing of the complaint in this case, including violations as much as 13 times over its permit limitation. *Id.* at 619-621. The increase in violations is explained by Laidlaw's failure to control its mercury feed rate, which it knew was needed to achieve compliance after the installation of the Lancy system. J.A. 598; Def. Exs. 105, 144; Pl. Ex. 143; Pl. Ex. 126, figure 1; Stipulation of December 11, 1996, Appendix 1, pp. 16-19.

In July 1992, a month after plaintiffs filed suit, Laidlaw reduced its mercury feed rate and installed new carbon adsorption equipment. 890 F. Supp. at 483; Pl. Ex. 126, figure 1; Pl. Ex. 143. In January 1993, Laidlaw installed equipment that aided the performance of the carbon filters in removing mercury. 890 F. Supp. at 483. As a result, the number and severity of its mercury violations dropped. 956 F. Supp. at 621. Nonetheless, Laidlaw violated the mercury discharge limitations in its permit 13 times after the complaint was filed. *Ibid.*

Plaintiffs, Friends of the Earth, CLEAN and the Sierra Club, brought this action on June 12, 1992, under the citizen suit provision of the Clean Water Act, Section 505, 33 U.S.C. 1365 (App. 10a), to enforce the terms and conditions of Laidlaw's permit. Laidlaw moved to dismiss Friends of the Earth, but not the other plaintiffs, for lack of standing on the ground that its members had not suffered injury-in-fact.

On June 30, 1993, the district court denied the motion. J.A. 13.

Laidlaw subsequently moved to dismiss under Section 505(b)(1)(B) of the Act, 33 U.S.C. 1365(b)(1)(B), on the ground that the suit was precluded because the State had brought an action in state court against Laidlaw three days before plaintiffs' action was filed. 890 F. Supp. at 474. The complaint in the state case had been drafted and filed by Laidlaw's counsel and the filing fee was paid by Laidlaw. *Id.* at 479. The complaint was filed at the request of Laidlaw for the purpose of barring plaintiffs' suit. *Id.* at 478. The district court denied the motion after a seven-day evidentiary hearing on the ground that the state action had not been diligently prosecuted for a number of reasons, but primarily because the $100,000 penalty did not remove the economic benefit enjoyed by Laidlaw as the result of its delayed compliance. *Id.* at 489-491, 497-499.

On June 27, 1995, the district court denied plaintiffs' motion for summary judgment for Laidlaw's violations. J.A. 23. On that same date, the district court granted Laidlaw's motion for summary judgment on all of its non-mercury discharge violations based on this Court's decision in *Gwaltney*, since none of the other permit limitations had been violated subsequent to the filing of the complaint. 956 F. Supp. at 592.

On July 31, 1995, the district court began a three-day trial on liability and relief. 956 F. Supp at 592. At the conclusion of the testimony, the district court reserved decision until a decision was issued in a state administrative proceeding involving a challenge to a change in the mercury limitation in Laidlaw's permit. *Ibid.* As a result, the district court did not issue its decision until January 22, 1997.

The district court found that Laidlaw had violated the mercury limitations in its permit 489 times, including 13 times after the complaint in this case was filed. 956 F. Supp. at 600, 621. The court also found that Laidlaw had violated the monitoring requirements in its permit 420 times and the reporting requirements 503 times, including 13 monitoring and 10 reporting violations after the complaint was filed. *Id.* at 600-601. The court found that Laidlaw had enjoyed an economic benefit of $1,092,581 from its violation of its permit. *Id.* at 606. However, the court concluded that a penalty of $405,800 was an adequate deterrent, when considered with the attorneys' fees award that Laidlaw would be required to pay to plaintiffs and Laidlaw's own litigation expenses. *Id.* at 610-611. The district court denied plaintiffs' request for injunctive relief because Laidlaw had achieved substantial compliance with its permit. *Id.* at 611.

Both sides appealed the district court's decisions. Laidlaw appealed, *inter alia*, on the ground that Friends of the Earth lacked standing because of its alleged failure to show injury-in-fact. The day before oral argument in the court of appeals, on March 4, 1998, this Court decided *Steel Co. v. Citizens for a Better Environment*, 118 S. Ct. 1003 (1998). On March 10, 1998, plaintiffs filed a motion asking the court of appeals for the opportunity to submit a brief showing that the decision in *Steel Co.* had no application. Laidlaw responded that *Steel Co.* "is largely irrelevant to the standing issue before this Court." Defendant-Appellee's Opposition to Plaintiffs' Motion for Leave to File an Additional Brief, March 18, 1998, p. 1. On April 7, 1998, the court of appeals granted plaintiffs' motion and directed the parties to brief the applicability of *Steel Co.*

In addition to the parties, the United States filed a brief as amicus curiae, arguing that *Steel Co.* did not apply

since that decision addressed standing at the time the case was filed as opposed to mootness later in the litigation. Supplemental Brief for the United States as *Amicus Curiae* in Support of Plaintiffs-Appellants, *Friends of the Earth, Inc v. Laidlaw Environmental Services (TOC), Inc.*, 4th Cir., Nos. 97-1246 and 97-1261, pp. 8-9 (App. 28a). The United States further contended that post-complaint compliance and the absence of injunctive relief do not render a request for civil penalties moot, unless the "defendant has carried its heavy burden of demonstrating that violations cannot reasonably be expected to recur * * *." *Id.*, p. 9 (App. 29a). The United States explained: "Where a defendant has a direct financial incentive to resume conduct that is illegal, cessation of illegal activity -- even if accompanied by a substantial period of compliance during the lawsuit -- is unlikely to be sufficient to make 'absolutely clear' that there is 'no reasonable expectation that the wrong will be repeated. *See Gwaltney*, 484 U.S. at 66-67; *see also W.T. Grant Co.*, 345 U.S. at 632-33 * * *." *Id.*, p. 10 (App. 29a-30a).

The court of appeals vacated and remanded with instructions to dismiss on the ground that the case was moot based on this Court's decision in *Steel Co.* App. 8a-9a. In doing so, it ignored the distinction between initial standing and mootness and applied the standing analysis in *Steel Co.* to the issue whether a case has become moot. It assumed "without deciding that Plaintiffs had standing to initiate this action and have proven a continuous injury in fact." App. 7a, n. 3. It reasoned that "[b]ecause Plaintiffs have not appealed the denial of declaratory and injunctive relief, the only potential relief that may be available to redress their claimed injuries is the civil penalty imposed upon Laidlaw" and "[s]uch penalties * * * cannot redress any injury suffered by a citizen plaintiff." App. 7a.

REASONS FOR GRANTING THE PETITION

1. The court of appeals' decision is directly inconsistent with this Court's decision in *Gwaltney*. The court of appeals assumed that plaintiffs' members had suffered injury-in-fact and that the injury was continuing at the time the complaint was filed. App. 7a, n. 3. Nevertheless it decided that plaintiffs had not satisfied the redressability requirement for standing and that therefore plaintiffs' request for civil penalties was moot solely on the ground that the district court had not granted declaratory or injunctive relief and the denial of such relief had not been appealed. This application of the *Steel Co.* standing analysis to a post-complaint mootness issue puts the decision below in direct conflict with this Court's decision in *Gwaltney*, where, despite facts nearly identical to those here, this Court concluded that the case was not moot.[1/]

In *Gwaltney*, as in this case, the district court had not issued injunctive relief and the plaintiffs had not appealed the issue to the court of appeals. *Chesapeake Bay Foundation, Inc. v. Gwaltney of Smithfield, Ltd.*, 890 F.2d 690, 692 (4th Cir. 1989). Consequently, by the time the case reached this Court, there was no possibility that injunctive relief would issue and the sole remaining claim was for civil penalties. This fact was specifically pointed out by petitioner in this Court. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation*, No. 86-473, Oct. Term 1987, Reply Br. for Petitioner, p. 16 (App. 40a). *See* 484 U.S. at 66. Moreover,

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1/The only difference between *Gwaltney* and the present case is, as we will discuss below (p. 17), that Laidlaw's violations continued after the complaint was filed whereas, in *Gwaltney*, the last violation was a month before the filing of the complaint. 484 U.S. at 53-54.

the petitioner in *Gwaltney* made the identical redressability argument that the court of appeals adopted in the present case. *Ibid.*

Nonetheless, this Court specifically held that the plaintiffs had constitutional standing under Article III to impose civil penalties despite the fact that injunctive relief was no longer being sought. 484 U.S. at 64-66. The Court further made clear that the case was not moot, despite the fact that the possibility of injunctive relief had been eliminated from the case. In response to petitioner's mootness argument, which specifically raised the issue of redressability, this Court discussed the applicability of mootness to citizen suits generally under the Clean Water Act. 484 U.S. at 66-67. *See Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation*, No. 86-473, Oct. Term 1987, Reply Br. for Petitioner, pp. 15-18 (App. 39a-43a). The Court did not find that the case was moot since, in the paragraph immediately following the discussion of mootness, it stated that it was remanding the case for a determination whether the complaint's allegation of continuing violations was made in good faith. 484 U.S. 67. If the absence of injunctive relief ipso facto rendered the case moot, there would have been no possible purpose to a remand.

Even if this Court had not specifically discussed the applicability of the mootness doctrine to citizen suits under the Clean Water Act in *Gwaltney*, it would have still been clear that the Court necessarily rejected the mootness argument of the petitioners in that case. This Court emphasized in *Steel Co.* that it is the practice of this Court to determine jurisdictional issues before dealing with the merits. 118 S. Ct. at 1012-1013. This rule applies just as much to mootness as to standing. As the Court stated in *United States v. Munsingwear*, 340 U.S. 36, 39 (1950):

> The established practice of this Court in dealing with a civil case from a court in the federal system which has become moot on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss.

It would therefore have been inconsistent with Article III of the Constitution and this Court's "established practice" for the Court to have ignored in *Gwaltney* a substantial jurisdictional issue that had been specifically raised before it.

This Court's refusal to dismiss *Gwaltney* on the ground of mootness because no injunctive relief had issued is consistent with the difference in the standards for issuing injunctions and dismissing on the ground of mootness. Injunctive relief requires plaintiffs to prove the likelihood of irreparable harm. As we will see below (pp. 17-19), mootness requires proof by defendants to a virtual certainty that the risk of harm has ceased. Thus, there are numerous intermediate situations where neither injunctive relief nor dismissal based on mootness is proper. *See, e.g., United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968)(even though the defendant on remand might be able to show that injunctive relief was inappropriate, the case was not moot); *United States v. W.T. Grant Co.*, 345 U.S. 629, 635-636 (1953) ("We conclude that, although the actions were not moot, no abuse of discretion has been demonstrated in the trial court's refusal to award injunctive relief").

The court of appeals in the instant case did not discuss or address *Gwaltney*, despite its direct relevance to

the court of appeals' mootness determination.[2/]

Instead, it based its decision on *Steel Co.* However, *Steel Co.* clearly did not overrule *Gwaltney*. This Court explicitly stated in *Steel Co.* that "Article III standing was * * * found [in *Gwaltney*]." 118 S. Ct. at 1011. Moreover, the Court relied in *Steel Co.* on the holding in *Gwaltney* in its detailed discussion of the requirement that courts must determine standing as a threshold matter before considering other issues in the case. *Id.* at 1009-1016.

Steel Co. involved the issue of standing, whereas *Gwaltney* involved mootness. *Steel Co.* involved a situation

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2/Plaintiffs relied heavily on *Gwaltney* throughout their brief on the *Steel Co.* issue in the court below. *See* Second Supplemental Brief for Appellants, April 24, 1998. In response, the court of appeals did not even mention *Gwaltney*, except to reject it with a "but see" citation on the separate attorneys' fee issue. *See* pp. 20-22 below. Plaintiffs submit that this was not an oversight; *Gwaltney* simply cannot be squared with the court of appeals' holding.

Indeed, a district court has held that the decision of the court of appeals in the present case implicitly overturned the court of appeals' prior decision in *Chesapeake Bay Foundation, Inc. v. Gwaltney of Smithfield, Ltd.*, *supra*, 890 F.2d at 696-697, which held that "the mooting of a claim for injunctive relief does not moot a claim for CWA civil penalties" (emphasis in original). *Dubois v. U.S. Dep't of Agriculture*, D.N.H., September 30, 1998, 1990 U.S. Dist. LEXIS 15198, * 12, n. 4. The district court did not note, however, that the court of appeals in the present case implicitly overturned this Court's decision in *Gwaltney* as well.

where the complaint contained no allegation of a continuing violation as this Court emphasized repeatedly. 118 S. Ct. at 1008, 1011, 1019. In *Gwaltney*, the complaint alleged continuing violation. 484 U.S. at 54.

This Court in *Steel Co.* emphasized the difference between standing and mootness (118 S. Ct. at 1019-1020):

> The United States, as *amicus curiae*, argues that the injunctive relief does constitute remediation because "there is a presumption of future injury when this defendant has voluntarily ceased its illegal activity in response to litigation," even if that occurs before a complaint is filed. * * * The "presumption" the Government refers to has been applied to refute the assertion of mootness by a defendant who, when sued in a complaint that alleges present or threatened injury, ceases the complained-of activity. See *e.g., United States v. W.T. Grant Co.*, 345 U.S. 629 (1953). It is an immense and unacceptable stretch to call the presumption into service as a substitute for the allegation of present or threatened injury upon which initial standing must be based.

Thus, *Steel Co.* carefully distinguished between initial standing and mootness. *Id.* at 1020.

The facts in the case are like those in *Gwaltney*, not *Steel Co.*, except that here there were post-complaint violations. The complaint here alleged continuing violations. The court of appeals here assumed standing and continuing violations at the time the complaint was filed. App. 7a, n. 3.

The issue here is therefore not standing as in *Steel Co.* but mootness as in *Gwaltney*. The issue is whether plaintiffs' request for civil penalties became moot on appeal because no injunctive relief had issued. Thus, the decision of the court of appeals below is not supported by *Steel Co.* and is directly inconsistent with *Gwaltney*.

2. Six courts of appeals have held that claims for penalties in citizen suits under the Clean Water Act are not moot even through claims for injunctive relief were no longer viable because the defendants had brought themselves into compliance with the Act. *Comfort Lake Ass'n, Inc. v. Dresel Contracting, Inc.*, 138 F.3d 351, 356 (8th Cir. 1998); *Atlantic States Legal Foundation, Inc. v. Stroh Die Casting Co.*, 116 F.3d 814, 820 (7th Cir. 1997), *certiorari denied*, 118 S. Ct. 442 (1997); *Natural Resources Defense Council, Inc. v. Texaco Refining and Manufacturing, Inc.*, 2 F.3d 493, 503-504 (3d Cir. 1993); *Atlantic States Legal Foundation, Inc. v. Pan American Tanning Corp.*, 993 F.2d 1017, 1020-1021 (2d Cir. 1993); *Atlantic States Legal Foundation, Inc. v. Tyson Foods, Inc.*, 897 F.2d 1128, 1135-1136 (11th Cir. 1990); *Pawtuxent Cove Marina, Inc. v. Ciba-Geigy Corp.*, 807 F.2d 1089, 1094 (1st Cir. 1986), *certiorari denied*, 484 U.S. 975 (1987). *See also Carr v. Alta Verde Industries, Inc.*, 931 F.2d 1055, 1065, n. 9 (5th Cir. 1991)(dictum). The decision of the court of appeals in this case is directly inconsistent with these decisions.

These cases are directly supported by the holding of this Court in *Powell v. McCormick*, 395 U.S. 486, 498-499 (1969). There, the Court held that a case is not moot where, as here, a monetary remedy is "hotly contested." *Id.* at 498. This Court said that an outstanding issue of monetary relief was itself sufficient to supply the constitutional requirement of a case or controversy, even though the primary remedy

sought in the case, injunctive relief, was no longer needed. Thus, this Court, like the six court of appeals, separated the issue of mootness for civil penalties from mootness for injunctive relief.

As noted above, this Court discussed in *Gwaltney* the applicability of the mootness doctrine to citizen suits under the Clean Water Act. However, in doing so, it did not indicate that it was dealing with civil penalties. All of the cases cited related to injunctive relief. Thus, there was no suggestion that claims for civil penalties based on violations over which the federal courts had jurisdiction could be barred retroactively based on mootness.

3. The court below concluded that civil penalties could not support redressability on the ground that this Court in *Steel Co.* had found that "any civil penalties imposed would be payable to the United States Treasury and not to the plaintiff and therefore that the penalties would not benefit the plaintiff." App. 8a. This holding was based on this Court's statement in *Steel Co.*, that the plaintiff's claim for civil penalties did not satisfy the redressability requirement for standing because (118 S. Ct. at 1018-1019):

> By the mere bringing of his suit, *every* plaintiff demonstrates his belief that a favorable judgment will make him happier. But although a suitor may derive great comfort and joy from the fact that the United States Treasury is not cheated, that a wrongdoer gets his just deserts, or that the nation's laws are faithfully enforced, that psychic satisfaction is not an acceptable Article III remedy because it does not redress any cognizable Article III injury. (emphasis

in original)

However, that statement was made by the Court in determining the initial standing of the plaintiff. The Court sharply distinguished in *Steel Co.* the situation where the plaintiff has not alleged a continuing violation from the situation where a continuing violation has been alleged and the violation and injury-in-fact continued after the filing of the complaint. 118 S. Ct. at 1019, 1020.

The interpretation by the court of appeals of this Court's holding in *Steel Co.* would make that decision directly inconsistent with this Court's decisions in *Tull v. United States*, 481 U.S. 412, 422-423 (1987), and *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 314 (1982). In *Weinberger v. Romero-Barcelo*, this Court, in a similar citizen suit under the Clean Water Act, stated that "[a]n injunction is not the only means of ensuring compliance" and then cited penalties. 456 U.S. at 314. Here, the court of appeals entirely ignored the fact that civil penalties, like injunctive relief, redress harm to the plaintiff by deterring continued and future violation of the statute. This Court in *Tull* and *Romero-Barcelo* explicitly noted the deterrent effect of civil penalties imposed under the Clean Water Act on future violations. Congress likewise has specifically concluded, in discussing civil penalties under the Water Act, that citizen suits "have deterred violators and achieved significant compliance gains." S. Rep. No. 50, 90th Cong., 1st Sess. 28 (1985). *See also* S. Rep. No. 228, 101st Cong., 1st Sess. 373 (1989) "[t]he assessment of civil penalties for violations of the [Clean Air] Act [is] necessary for

deterrence, restitution and retribution").[3/] Thus, where violations are alleged in the complaint and are in fact continuing after the suit has been filed, civil penalties effectively bring violators into compliance and induce them to continue to comply. Therefore, civil penalties, according to both this Court and Congress, provide redress for the harm to the plaintiffs.

Even, if contrary to our argument above, this Court's decision in *Gwaltney* did not determine that the case was not moot, it surely determined that civil penalties could redress violations that continued subsequent to the filing of the complaint. Since, as we have noted (p. 8), civil penalties were the sole relief left in the case and this Court upheld plaintiffs' standing, it necessarily held that civil penalties can provide redressability for the defendant's continuing violations.

Here, the district court made clear that, in denying injunctive relief, it was not finding that violations of the permit would not occur in the future. It specifically stated that "a defendant in substantial compliance with its NPDES permit is not required to show that there is no chance of a future permit violation in order to defeat a request for injunctive relief." 956 F. Supp. at 611. It further stated that "[t]aken together, this court believes the above penalty, potential fee awards, and Laidlaw's own direct and indirect litigation expenses provide adequate deterrence under the circumstances of this case." *Ibid.* Thus, the district court specifically found that the penalty it imposed would be a deterrent to possible future violations.

3/Congress' determination as to the effect of civil penalties is entitled to substantial deference. *See, e.g., Preseault v. Interstate Commerce Commission*, 494 U.S. 1, 17 (1990).

4. Even if the court of appeals had not assumed continuing injury but had decided that no continuing injury existed, its decision to dismiss this case would still have been directly inconsistent with this Court's decision in *Gwaltney*. In *Gwaltney*, the defendant's last violation had occurred a month before the complaint was filed and 3 and 1/2 years before this Court issued its decision. 484 U.S. at 53-54. Nevertheless, as noted above, this Court did not dismiss, but instead remanded the case to determine whether the allegation of continuing violations in the complaint was made in good faith. *Id.* at 67. Subsequently, on remand, the Court of Appeals for the Fourth Circuit affirmed the district court's holding that the plaintiff had proved a continuing violation at the time of the complaint, even though there had been no violations for 5 and 1/2 years. *Chesapeake Bay Foundation, Inc. v. Gwaltney of Smithfield, Ltd.*, *supra*, 890 F.2d at 695.

In comparison, Laidlaw's last violation occurred in January 1995. 956 F. Supp. at 621. Thirty-six of Laidlaw's violations occurred after the complaint was filed. *Id.* at 600-601. There were numerous violations for 4 months and sporadic violations for 2 and 1/2 years after the complaint was filed. *Id.* at 621. Thus, if, as this Court necessarily found, the plaintiffs in *Gwaltney* were suffering continuing injury, based on pre-complaint violations sufficient to prevent mootness, *a fortiori*, so were plaintiffs in the present case.

5. This Court's decisions in *Gwaltney* and *Steel Co.* explain why plaintiffs in *Gwaltney* and in this case have suffered continuing injury. In *Gwaltney*, this Court set forth the following strict limitation on the applicability of the mootness doctrine in terminating cases as to which the federal courts had jurisdiction when the suit was brought (484 U.S. at 66):

> Long-standing principles of mootness * * * prevent the maintenance of suit when "there is no reasonable expectation that the wrong will be repeated." *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953) * * *. In seeking to have a case dismissed as moot, however, the defendant's burden "is a heavy one." 345 U.S. at 633. The defendant must demonstrate that it is "*absolutely clear* that the allegedly wrongful behavior could not be reasonably expected to recur." *United States v. Phosphate Export Ass'n, Inc.*, 393 U.S. 199, 203 (1968) (emphasis added [by this Court in *Gwaltney*]).

As we have seen above (p. 12), this Court in *Steel Co.* made clear the difference between the strict limitations of the mootness doctrine and the standing principles that apply to the initiation of a case. Citing *United States v. W.T. Grant Co.*, just as in *Gwaltney*, the Court approved the government's contention that there is a presumption "of [future] injury when the defendant has voluntarily ceased its illegal activity in response to litigation." 118 S. Ct. at 1019. Since plaintiffs here alleged future violations and defendant's violations in fact continued after the complaint was filed, the presumption of future injury referred to by the United States, and recognized by the Court in both *Gwaltney* and *Steel Co.*, applies. *See also Cardinal Chemical Co. v. Morton International, Inc.*, 508 U.S. 83, 98 (1993) ("If a party to an appeal suggests that the controversy has, since the rendering of judgment below, become moot, that party bears the burden of coming forward with the subsequent events that have produced that alleged result"). The decision of the court of appeals below ignores the distinction between standing and mootness.

There is no evidence in the present case that makes it "absolutely clear that the allegedly wrongful behavior could not be reasonably expected to recur." On the contrary, a substantial part of Laidlaw's remedy for its violations involved its decision to reduce the mercury content of the waste it fed into its incinerator. 890 F. Supp. at 478, 483; J.A. 124. Laidlaw had reduced the mercury content in the past and subsequently increased it. J.A. 598; Pl. Ex. 131-132; Def. Exs. 105, 144. Laidlaw could easily change its practice again at any time in the future.

6. This Court held in *Steel Co.* that a declaratory judgment as to liability does not support the redressability requirement of standing where the issue of liability was not contested (118 S. Ct. at 1018):

> There being no controversy over whether petitioner failed to file reports, or over whether such a failure constitutes a violation, the declaratory judgment is not only worthless to respondent, it is seemingly worthless to all the world.

Here, plaintiffs sought a declaratory judgment as to liability. J.A. 8. Laidlaw's answer denied all of allegations in plaintiffs' amended complaint that Laidlaw had violated the discharge, monitoring and reporting requirements of its permit. Amended Complaint, para. 27; Answer, para. 26. When plaintiffs moved for partial summary judgment on all of Laidlaw's violations, Laidlaw opposed summary judgment on its mercury discharge violations on the ground that the permit was erroneous. Defendant's Response in Opposition to Plaintiffs' Motion for Partial Summary Judgment, June 7, 1995, p. 3. Laidlaw argued that "most of the alleged monitoring violations are incorrect" (*ibid.*) and that most of

the reporting violations likewise did not occur (*id.*, p. 5). At trial, Laidlaw continued to dispute the monitoring and reporting violations. Tr., 7/31/95, p. 11. After trial, while it no longer disputed the discharge violations, Laidlaw continued to dispute most of the monitoring and reporting violations. Defendant's Proposed Findings of Fact and Conclusions of Law, October 13, 1995, pp. 12-15. Thus, defendant did not concede its mercury discharge violations until three years after the start of the litigation and never conceded its monitoring and reporting violations.

Contrary to the conclusion of the court of appeals, the district court did effectively issue a declaratory judgment. It determined that Laidlaw was liable for 489 discharge, 420 monitoring, and 503 reporting violations. 956 F. Supp. at 610, 613-621. This determination was far from worthless; it determined that defendant had engaged in repeated, flagrant and long-standing violation of federal law. Thus, the decision of the court of appeals is in conflict with *Steel Co.* even if *Steel Co.* fully applies to cases where the plaintiffs have standing and the issue involves mootness because of the defendant's subsequent compliance.

7. In *Gwaltney*, this Court stated (484 U.S. at 67, n. 6):

> Under the Act, plaintiffs are also protected from the suddenly repentant defendant by the authority of the district courts to award litigation costs "whenever the court determines such award is appropriate." 33 U.S.C. § 1365(d). The legislative history of this provision states explicitly that the award of costs" should extend to plaintiffs in action

> which result in successful abatement but do not reach a verdict. For instance, if as a result of a citizen proceeding and believe a verdict is issued, a defendant abated a violation, the court may award litigation expenses borne by the plaintiff in prosecuting such actions." S. Rep. No. 92-414, p. 81 (1971), 2 Leg. Hist. 1499.

The court of appeals' decision that plaintiffs are not entitled to attorneys' fees is directly inconsistent with this dictum, other decisions of this Court and decisions of nine other circuits.

The court of appeals held that "Plaintiffs' failure to obtain relief on the merits of their claims precludes any recovery of attorneys' fees or other litigation costs because such an award is available only to a 'prevailing or substantially prevailing party.' 33 U.S.C.A. §1365(d) * * *." App. 9a, n. 5. The court of appeals relied on this Court's decision in *Farrar v. Hobby*, 506 U.S. 103 (1992), and an earlier decision of its own, *S-1 & S-2 v. State Board of Education*, 21 F.3d 49 (1994)(en banc), in which it had held that plaintiffs who had obtained a judgment that was subsequently vacated because of mootness were not prevailing parties. App. 9a, n. 5.

The court of appeals implicitly, but clearly, admitted that its decision on attorneys' fees was inconsistent with this Court's dictum in *Gwaltney*. It did so by prefacing its citation to *Gwaltney* with "But see." App. 9a, n. 5. Such a citation of an opinion of this Court by a court of appeals is, to say the least, unusual. The court of appeals' only explanation for doing so was to note that this Court discussed the prior language of Section 505(d) of the Act, rather than

the language of the 1987 amendment to Section 505(d), which had been passed shortly before this Court's opinion. Thus, the court of appeals decided to ignore this Court's dictum in *Gwaltney* because it believed that the dictum was erroneous.

This Court's dictum in *Gwaltney* was not erroneous. The legislative history of the 1987 amendment to Section 505(d) shows that the change in the language of Section 505(d) was intended merely to clarify Congress' intent that citizen plaintiffs not receive attorneys' fee awards when the plaintiffs had lost the litigation. S. Rep. No. 50, 99th Cong., 1st Sess. 33 (1985); S. Rep. No. 233, 98th Cong., 1st Sess. 24-25 (1983); A Legislative History of the Water Quality Act of 1987, 100th Cong., 2d Sess., Sen. Print 144 (Nov. 1988), vol. 2, pp. 1311-1312 (remarks of Senator Chafee, the sponsor of the legislation).[4/] The Senate reports specifically state that the plaintiff may prevail as the result of settlement rather than through a court order. It equally follows that a citizen prevails through the defendant bringing itself into compliance with the statute.

In addition to this Court's dictum in *Gwaltney*, the decision below conflicts with other decisions of this Court. In *Hewitt v. Helms*, 482 U.S. 755, 760-761 (1987), this Court stated:

> It is settled law, of course, that relief need not

4/Congress' compiled legislative history of the 1987 amendments includes Senate Report 50 and Senate Report 233. *See* A Legislative History of the Water Quality Act of 1987 (Public Law 100-4) Including Public Law 97-440; Public Law 97-117; Public Law 96-483; and Public Law 96-148, pp. 1420-1545, 2195-2216 (November 1988).

> be judicially decreed in order to justify a fee award under § 1988. A lawsuit sometimes produces voluntary action by the defendant that affords the plaintiff all or some of the relief he sought through a judgment - *e.g.*, * * * a change in conduct that redresses the plaintiff's grievances. When that occurs, the plaintiff is deemed to have prevailed despite the absence of a formal judgment in his favor.

The Court went on to say that "in a declaratory judgment action: if the defendant, under pressure of the lawsuit, alters his conduct (or threatened conduct) towards the plaintiff that was the basis for the suit, the plaintiff will have prevailed. *That* is the proper equivalent of a judicial judgment which would produce the same effect * * *" (emphasis in original). *Id.* at 761.[5/]

In *Maher v. Gagne*, 448 U.S. 122, 129 (1980), in holding that a settlement was adequate to confer prevailing party status, the Court quoted a Senate report that stated that "for purposes of the award of counsel fees, parties may be considered to have prevailed when they vindicate rights * * * without formally obtaining relief." *See* S. Rep. No. 1011, 94th Cong., 2d Sess. 5 (1976). *Accord Hanrahan v. Hampton*, 446 U.S. 754, 756-757 (1979). *See also* H. Rep. No. 1558, 94th Cong., 2d Sess. 7 (1976) ("Similarly, after a complaint is filed a defendant might voluntarily cease the

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5/The plaintiff in *Hewitt* was denied fees because the changes in prison policies would not benefit him since he was no longer in custody. 482 U.S. at 763. However, here, since plaintiffs' members continue to use the affected waters, they benefit from defendant's compliance with the Clean Water Act.

unlawful practice. A court might still award fees even though it might conclude, as a matter of equity that no formal relief, such as an injunction, is needed").

Moreover, the position of the Court of Appeals for the Fourth Circuit in the decision below and *S-1 & S-2 v. State Board of Education* is inconsistent with the decisions of nine other Circuits which have been decided subsequent to this Court's decision in *Farrar*. *Comfort Lake Ass'n, Inc. v. Dresel Contracting, Inc.*, *supra*, 138 F.3d at 357-358; *Maduka v. Meissner*, 114 F.3d 1240, 1241 (D.C. Cir. 1997); *Zinn by Blankenship v. Shalala*, 35 F.3d 273, 274-276 (7th Cir. 1994); *Baumgartner v. Harrisburg Housing Authority*, 21 F.3d 541, 546-550 (3d Cir. 1994); *LaRouche v. Kezer*, 20 F.3d 68, 71, n. 4 (2d Cir. 1994); *Little Rock School District v. Pulaski County Special School District*, 17 F.3d 260, 263 and n. 2 (8th Cir. 1994); *American Council for the Blind of Colorado, Inc. v. Romer*, 992 F.2d 249, 250 (10th Cir. 1993), *certiorari denied*, 510 U.S. 864 (1993); *Craig v. Gregg County, Texas*, 988 F.2d 18, 20-21 (5th Cir. 1993); *Paris v. U.S. Department of Housing and Urban Development*, 988 F.2d 236, 240-241 (1st Cir. 1993); *Pembroke v. Wood County, Texas*, 981 F.2d 225, 231, n. 27 (5th Cir. 1993), *certiorari denied*, 508 U.S. 973 (1993); *Citizens Against Tax Waste v. Westerville City School*, 985 F.2d 255, 257-258 (6th Cir. 1993). These decisions hold that, even if the plaintiff has not obtained relief from the court, it is entitled to attorneys' fees if it has in fact obtained a significant part of the relief requested and the litigation was a catalytic or substantial factor in obtaining that relief.[6/]

6/However, the courts of appeals have held that plaintiffs are not entitled to attorneys' fees, even if they have obtained relief because of the litigation, if the court lacked jurisdiction from the start of the litigation. *E.g.*, *Lundon v. Meehan*, 980 F.2d 1450, 1461-1462 (D.C. Cir. 1992); *W.G. ex rel. D.G. v. Senatore*, 18 F.3d 60, 64 (2d Cir. 1994). Since the court below assumed that plaintiffs had standing to initiate this action (App. 7a, n. 3), these cases are inapplicable.

The decisions of the nine other Circuits are fully consistent with this Court's decision in *Farrar*. In *Farrar*, the Court stated that "to qualify as a prevailing party, a civil rights plaintiff must obtain at least some relief on the merits of his claim." 506 U.S. at 111. However, the Court went on to say (*ibid.*):

> Whatever relief the plaintiff secures must directly benefit him at the time of the judgment or settlement. Otherwise the judgment or settlement cannot be said to "affec[t] the behavior of the defendant toward the plaintiff." Only under these circumstances can civil rights litigation effect "the material alteration of the legal relationship of the parties" and thereby transform the plaintiff into a prevailing party. (citations omitted)

This is a case which was properly brought. As the district court held and the court of appeals assumed, the district court had jurisdiction when the case was filed. Plaintiffs obtained relief by bringing Laidlaw into compliance. In other words, as a result of the suit, Laidlaw took the actions the suit was designed to effectuate. The fact that the relief plaintiffs obtained was vacated is irrelevant, since the vacation of the judgment occurred precisely because the suit had been successful in obtaining Laidlaw's compliance with the statute.

8. The decision of the court of appeals below is of devastating consequence to citizen suits under the Clean Water Act and other environmental statutes.

The determination that any suit must be dismissed as moot simply because no injunctive relief issued would allow defendants to win virtually any citizen suit by delaying the determination as to injunctive relief long enough to allow it to bring itself sufficiently into compliance so that irreparable injury to the plaintiffs could no longer be shown. As this case well illustrates, such issues as notice, standing, preclusion and numerous other possible defenses can be used to delay injunctive relief, even when violations are continuing to occur, because the plaintiff's success is not yet sufficiently clear to support an injunction. As this case also unfortunately illustrates, resolution of liability and relief in the district courts in Clean Water Act and other environmental cases often takes many years.[7/]

The decision of the court below will only encourage defendants to take every possible step to delay resolution of injunctive relief. The Court of Appeals for the Third Circuit has stated (*Natural Resources Defense Council, Inc. v. Texaco Refining and Manufacturing, Inc.*, *supra*, 2 F.3d at 503-504):

> A citizen suit would lose much of its effectiveness if a defendant could avoid

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7/Plaintiffs' counsel in this litigation has a similar case pending in the District Court for the District of New Jersey which was filed in May 1989, and which is awaiting decision concerning the civil penalty to be imposed after a trial in February 1997. *PIRG v. Hercules, Inc.*, D.N.J., Civil No. 89-2291.

> paying any penalties by post-complaint compliance. If penalty claims could be mooted, polluters would be encouraged to "delay litigation as long as possible, knowing that they will thereby escape liability even for post-complaint violations, so long as violations have ceased at the time the suit comes to trial." Moreover, whether or not damage claims are mooted would depend on the vagaries of when the district court happens to set the case for trial. We cannot embrace a rule that would weaken the deterrent effect of the Act by diminishing incentives for citizens to sue and encourage dilatory tactics by defendants. (footnotes and citations omitted)[8/]

Even more important, however, the decision of the court of appeals is almost certain to lead environmental groups to cease bringing citizen suits. It makes little sense for citizen groups to seek to enforce the Clean Water Act and other environmental laws when, after years of litigation, a company that has repeatedly violated the statute for a long period of time avoids any penalty for its violations. This case unfortunately illustrates the problem all too well. After six years of litigation, and, we emphasize, successful

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8/A recent decision of the District Court for the District of New Hampshire has recently gone even further by holding, in reliance on the decision of the court of appeals in the present case, that, even where injunctive relief has been granted, the mootness doctrine bars a citizen suit under the Clean Water Act for civil penalties once the violations have ceased because the injunction assures that violations are not likely to recur. *Dubois v. U.S. Dep't of Agriculture*, *supra*, * 12-14.

litigation which led the defendant to cease its violations and required it to pay a substantial penalty, the case has been dismissed without any penalty being imposed for Laidlaw's hundreds of violations.[9/]

The further determination of the court of appeals that, contrary to the law in other circuits, plaintiffs are not entitled to attorneys' fees, would virtually assure that few citizen suits will be brought. As again this case illustrates, enforcement suits under the Clean Water Act and other environmental statutes are major, complex litigation requiring substantial resources. The expert witness' fees of citizen-plaintiffs customarily are at least tens of thousands of dollars. The attorneys' fees would be hundreds of thousands of dollars or more if citizen-plaintiffs could compensate their attorneys. Since citizen-plaintiffs rarely have such resources, most citizen enforcement suits are brought on the basis of the attorneys being compensated solely by court awards if the suits are successful. Extremely few lawyers will be willing to bear large costs in the form of expert witness' fees and their own uncompensated time only to find that their suit has led the defendant to comply with the statute and therefore, for this very reason, the case must be dismissed without any award of attorneys' fees or expenses.

In passing the provision of the Clean Water Act providing for the payment of the attorneys' fees and expert

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9/Laidlaw did pay a penalty of $100,000 to the State. 890 F. Supp. at 479. The district court found that the state suit did not preclude this action largely because of the clear inadequacy of this penalty. 890 F. Supp. at 490-498. However, in the overwhelming majority of cases, no penalty will be paid if the case is dismissed as moot because the defendant has finally come into compliance.

witness fees of successful plaintiffs, Congress intended to induce attorneys to be willing to bring these cases. *Student Public Interest Research Group of New Jersey v. AT&T Bell Laboratories*, 842 F.2d 1436, 1448-1449 (3d Cir. 1988). Congress did this by providing for compensation at market rates so that attorneys handling these cases would be compensated, when the litigation was successful, to the same degree as when they did other legal work. *See ibid.* The decision of the Court below deeply undermines this inducement. It means that even when the litigation is fully successful, it will often result in no compensation to the plaintiff's attorneys. Such a result is not only obviously unfair but directly contrary to Congress' intent.

Finally, the decision of the court of appeals on the attorneys' fees issue will affect the willingness of lawyers to bring not only citizen suits under environmental statutes but suits under civil rights statutes and other statutes where Congress has provided for fee-shifting.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

Bruce J. Terris
Carolyn Smith Pravlik
Kathleen L. Millian

James S. Chandler, Jr.

Counsel for Petitioners

APPENDIX

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FRIENDS OF THE EARTH, INCORPORATED; CITIZENS LOCAL ENVIRONMENTAL ACTION NETWORK, INCORPORATED; SIERRA CLUB, *Plaintiffs-Appellees,*	)
v.	)
LAIDLAW ENVIRONMENTAL SERVICES (TOC), INCORPORATED, *Defendant-Appellant.*	)
SOUTH CAROLINA CHAMBER OF COMMERCE; ENVIRONMENTAL MANAGEMENT ASSOCIATION OF SOUTH CAROLINA; SOUTH CAROLINA MANUFACTURERS ALLIANCE; CALIFORNIA PUBLIC INTEREST RESEARCH GROUP; FLORIDA PUBLIC INTEREST RESEARCH GROUP; ILLINOIS PUBLIC INTEREST RESEARCH GROUP; MASSACHUSETTS PUBLIC INTEREST RESEARCH GROUP; PUBLIC INTEREST RESEARCH GROUP IN MICHIGAN; PUBLIC INTEREST RESEARCH GROUP OF NEW JERSEY; OHIO PUBLIC INTEREST RESEARCH GROUP; OREGON STATE PUBLIC INTEREST RESEARCH GROUP; WASHINGTON PUBLIC INTEREST RESEARCH GROUP; UNITED STATES OF AMERICA; SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL, *Amici Curiae.*	) No. 97-1246

FRIENDS OF THE EARTH, INCORPORATED; CITIZENS LOCAL ENVIRONMENTAL ACTION NETWORK, INCORPORATED; SIERRA CLUB,
Plaintiffs-Appellees,

v.

LAIDLAW ENVIRONMENTAL SERVICES (TOC), INCORPORATED,
Defendant-Appellant.

SOUTH CAROLINA CHAMBER OF COMMERCE; ENVIRONMENTAL MANAGEMENT ASSOCIATION OF SOUTH CAROLINA; SOUTH CAROLINA MANUFACTURERS ALLIANCE; CALIFORNIA PUBLIC INTEREST RESEARCH GROUP; FLORIDA PUBLIC INTEREST RESEARCH GROUP; ILLINOIS PUBLIC INTEREST RESEARCH GROUP; MASSACHUSETTS PUBLIC INTEREST RESEARCH GROUP; PUBLIC INTEREST RESEARCH GROUP IN MICHIGAN; PUBLIC INTEREST RESEARCH GROUP OF NEW JERSEY; OHIO PUBLIC INTEREST RESEARCH GROUP; OREGON STATE PUBLIC INTEREST RESEARCH GROUP; WASHINGTON PUBLIC INTEREST RESEARCH GROUP; UNITED STATES OF AMERICA; SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL,
Amici Curiae.

No. 97-1246

Appeals from the United States District Court
for the District of South Carolina at Columbia.
Joseph F. Anderson, Jr., District Judge.
(CA-92-1697-3-17)

Argued: March 5, 1998

Decided: July 16, 1998

Before WILKINS and HAMILTON, Circuit Judges, and BROADWATER, United States District Judge for the Northern District of West Virginia, sitting by designation.

Vacated and remanded by published opinion. Judge Wilkins wrote the opinion, in which Judge Hamilton and Judge Broadwater joined.

COUNSEL

ARGUED: Bruce J. Terris, TERRIS, PRAVLIK & WAGNER, Washington, D.C., for Appellants. Donald Alan Cockrill, OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C., Greenville, South Carolina, for Appellee. **ON BRIEF:** Carolyn Smith Pravlik, TERRIS, PRAVLIK & WAGNER, Washington, D.C.; James S. Chandler, Jr., SOUTH CAROLINA ENVIRONMENTAL LAW PROJECT, Pawleys Island, South Carolina, for Appellants. Kristofer K. Strasser, Jack D. Todd, OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C., Greenville, South Carolina for Appellee. Deborah Ann Hottel, MCNAIR LAW FIRM, P.A., Columbia, South Carolina; Thomas S. Mullikin, MULLIKIN LAW FIRM, Camden, South Carolina, for Amici Curiae Chamber of Commerce, et al. Charles C. Caldart, David A. Nicholas, NATIONAL ENVIRONMENTAL LAW CENTER, Boston, Massachusetts, for Amici Curiae California

Public Interest, et al. Lois J. Schiffer, Assistant Attorney General, James F. Simon, Deputy Assistant Attorney General, Martin W. Matzen, Thomas A. Mariani, Jr., Julie B. Kaplan, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C.; Susan Lepow, Associate General Counsel, Richard Witt, Office of General Counsel, David Drelich, Senior Attorney, Office of Enforcement and Compliance Assurance, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Washington, D.C., for Amicus Curiae United States. Carlisle Roberts, Jr., Samuel L. Finklea, III, William A. Ready, III, SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL, Columbia, South Carolina, for Amicus Curiae Department of Health.

OPINION

WILKINS, Circuit Judge:

Plaintiffs Friends of the Earth, Inc. (FOE), Citizens Local Environmental Action Network, Inc. (CLEAN), and Sierra Club appeal an order of the district court penalizing Laidlaw Environmental Services (*TOC), Inc. (Laidlaw) for violations of a National Pollutant Discharge Elimination System (NPDES) permit, arguing that the district court abused its discretion by imposing what Plaintiffs assert was an inadequate penalty. Laidlaw cross appeals, claiming, *inter alia*, that Plaintiffs lacked standing to institute this action because they suffered no injury in fact and that this suit should have been barred because the South Carolina Department of Health and Environmental Control (DHEC) diligently prosecuted a prior action regarding the same

violations, *see* 33 U.S.C.A. § 1365(b)(1)(B) (West 1986). We conclude that this action is now moot; accordingly, we vacate the order of the district court and remand with instructions to dismiss.

I.

Plaintiffs brought this enforcement action against Laidlaw[1] pursuant to the citizen-suit provision of the Federal Water Pollution Control Act, *see* 33 U.S.C.A. § 1365(a)(1) (West 1986 & Supp. 1998), alleging ongoing violations by Laidlaw of an NPDES permit and seeking imposition of monetary penalties as well as declaratory and injunctive relief and attorneys' fees and costs. After a seven-day hearing, the district court ruled that the prior suit by DHEC that Laidlaw alleged barred the current action had not been "diligently prosecuted" within the meaning of § 1365(b)(1)(B)[2] and therefore would not serve to bar present suit. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 890 F. Supp. 470, 498 (D.S.C. 1995). Following a bench trial, the district court found that Laidlaw had committed numerous permit violations and imposed a penalty of $405,800. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 956 F. Supp. 588, 600-01, 610 (D.S.C. 1997). However, because the court found that Laidlaw's violations

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[1]FOE and CLEAN initiated the suit, and Sierra Club subsequently joined as an additional plaintiff. *See* Fed. R. Civ. P. 21.

[2]Section 1365(b)(1)(B) provides that a citizen suit under the Federal Water Pollution Control Act may not be commenced when the "State has commenced and is diligently prosecuting a civil ... action in a court of the ... State to require compliance." 33 U.S.C.A. §1365(b)(1)(B).

had not harmed the environment and that Laidlaw had been in substantial compliance for several years at the time of the issuance of its final order, the court denied Plaintiffs' request for declaratory and injunctive relief. *See id.* at 611. In a separate order, the court stayed the time for a petition for attorney's fees until the time for appeal had expired or, if either party appealed, until the appeal was resolved. This appeal followed.

II.

The Constitution provides that "[t]he judicial Power" of the federal courts of the United States extends only to specified "Cases" and "Controversies." U.S. Const. art. III, § 2, cl. 1; *see In re Pruett*, 133 F.3d 275, 278 (4th Cir. 1997). "The doctrine of standing has always been an essential component of [the] case or controversy requirement of federal jurisdiction." *Marshall v. Meadows*, 105 F.3d 904, 906 (4th Cir. 1997). In order to have standing, a plaintiff must have suffered an actual or threatened injury in fact; the injury must have been caused by the defendant's complained-of conduct; and the injury must be redressable by the relief sought. *See Steel Co. v. Citizens for a Better Env't*, 118 S. Ct. 1003, 1016-17 (1998). Moreover, these elements must continue to exist at every stage of review, not merely at the time of the filing of the complaint. *See Arizonans for Official English v. Arizona*, 117 S. Ct. 1055, 1068 (1997); *Suarez Corp. Indus v. McGraw*, 125 F.3d 222, 228 (4th Cir. 1997). Otherwise, the action becomes moot. *See United States Parole Comm'n v. Geraghty*, 445 U.S. 338, 397 (1980) (explaining that mootness has been described as "the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)" (internal quotation marks omitted)). The continued presence

of these elements ensures that the plaintiff has "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues." *Baker v. Carr*, 369 U.S. 186, 204 (1962).

Here, we focus on the continued existence of the third element, redressability.[3] Because Plaintiffs have not appealed the denial of declaratory and injunctive relief, the only potential relief that may be available to redress their claimed injuries is the civil penalty imposed upon Laidlaw, which would be paid to the United States Treasury. *See Atlantic States Legal Found., Inc. v. Tyson Foods, Inc.*, 897 F.2d 1128, 1131 n.5 (11th Cir. 1990). Such penalties, however, cannot redress any injury suffered by a citizen plaintiff. *See Steel Co.*, 118 S. Ct. at 1018-19.

In *Steel Co.*, the Supreme Court held that a plaintiff lacked standing to prosecute a private enforcement action under the

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[3]Laidlaw claims that Plaintiffs were never injured by its permit violations because the violations caused no harm to the environment. Laidlaw also asserts that even if Plaintiffs had been injured by the violations in the past, they no longer have any stake in prosecuting this action because Laidlaw has been in compliance with its permit for several years. For purposes of this appeal, we assume without deciding that Plaintiffs had standing to initiate this action and have proven a continuous injury in fact. *See Arizonans for Official English*, 117 S. Ct. at 1068 (deciding the case on the basis of mootness without first determining whether appellants had "standing to appeal because the former question, like the latter, goes to the Article III jurisdiction of this Court and the courts below, not to the merits of the case").

citizen-suit provision of the Emergency Planning and Community Right-To-Know Act of 1986, *see* 42 U.S.C.A. § 11046(a)(1) (West 1995), because the relief requested could not redress the injury plaintiff had allegedly suffered. *See Steel Co.*, 118 S. Ct. at 1017-20. In particular, the Court noted that any civil penalties imposed would be payable to the United States Treasury and not to the plaintiff and therefore that the penalties would not benefit the plaintiff. *See id.* at 1018-19. The Court reasoned that

> although a suitor may derive great comfort and joy from the fact that the United States Treasury is not cheated, that a wrongdoer get his just deserts, or that the nation's laws are faithfully enforced, that psychic satisfaction is not an acceptable Article III remedy because it does not redress a cognizable Article III injury.

Id. at 1019.[4] Applying the reasoning of *Steel Co.*, we conclude that this action is moot because the only remedy

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[4]Prior to *Steel Co.*, which was decided after the district court rendered its decision in the case at bar, this court had held that because "penalties can be an important deterren[t] against future violation," they could redress a private plaintiff's injury from violations even though the penalties are not paid to the plaintiff. *Sierra Club v. Simkins Indus., Inc.*, 847 F.2d 1109, 1113 (4th Cir. 1988). Because *Steel Co.*, constitutes "a superseding contrary decision of the Supreme Court," we are required to follow it. *Hoffman v. Hunt*, 126 F.3d 575, 584 (4th Cir. 1997) (internal quotation marks omitted), *cert. denied*, 66 U.S.L.W. ___ (U.S. May 26, 1998) (No. 97-1322).

currently available to Plaintiffs--civil penalties payable to the government--would not redress any injury Plaintiffs have suffered. We therefore vacate the order of the district court and remand with instructions to dismiss this action.[5] *See Arizonans for Official English*, 117 S. Ct. at 1071.

VACATED AND REMANDED

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[5]Plaintiffs' failure to obtain relief on the merits of their claims precludes any recovery of attorneys' fees or other litigation costs because such an award is available only to a "prevailing or substantially prevailing party." 33 U.S.C.A. §1365(d) (West Supp. 1998); *cf. Farrar v. Hobby*, 506 U.S. 103, 111 (1992) (explaining that "to qualify as a prevailing party, a civil rights plaintiff must obtain at least some relief on the merits of his claim"); *S-1 & S-2 v. State Bd. of Educ.*, 21 F.3d 49, 51 (4th Cir. 1994) (en banc) (per curiam) (adopting the dissenting opinion reported at 6 F.3d 160, 168-72 (4th Cir. 1993), wherein Judge Wilkinson concluded that *Farrar* dictates that civil rights plaintiffs who obtained a judgment against a defendant that was subsequently vacated by this court on mootness grounds were not "prevailing part[ies]" entitled to an award of litigation costs). *But see Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 67 n.6 (1987) (citing 1971 legislative history for the proposition that an award of litigation costs could be allowed under §1365(d) when a case becomes moot because the defendant violator voluntarily came into compliance with the law, but not discussing the 1987 amendment to §1365(d) requiring a plaintiff to be a "prevailing or substantially prevailing party" to receive an award of litigation costs).

STATUTES INVOLVED

The following are the relevant statutory provisions of the

Federal Water Pollution Control Act:

33 U.S.C. 1365:

§ 1365. Citizen suits

(a) **Authorization; jurisdiction**
Except as provided in subsection (b) of this section and section 1319(g)(6) of this title, any citizen may commence a civil action on his own behalf--

(1) against any person including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, * * *.

* * *

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 1319(d) of this title.

(d) Litigation Costs.
The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation

(including reasonable attorney and expert witness fees) to any prevailing or substantially prevailing party, whenever the court determines such award is appropriate. * * *

(g)"Citizen" defined.

For the purposes of this section the term "citizen" means a person or persons having an interest which is or may be adversely affected.

33 U.S.C. 1319(D):

(d) Civil penalties; factors considered in determining amount.

Any person who violates section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator, or by a State, or in a permit issued under section 1344 of this title by a State, or any requirement imposed in a pretreatment program approved under section 1342(a)(3) or 1342(b)(8) of this title, and any person who violates any order issued by the Administrator under subsection (a) of this section, shall be subject to a civil penalty not to exceed $25,000 per day for each violation. In determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty or the violator, and such other matters as justice may require. * * *

Nos. 97-1246 and 97-1261

IN THE UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

Friends of the Earth, Inc., Citizens Local Environmental Action Network, Inc., and Sierra Club

Plaintiffs-Appellants,

v.

Laidlaw Environmental Services (TOC), Inc.,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA, COLUMBIA DIVISION

SUPPLEMENTAL BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLANTS

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IN THE UNITED STATES COURT OF APPEALS

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA, COLUMBIA DIVISION

SUPPLEMENTAL BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLANTS

STATEMENT OF ISSUES

I. Whether a defendant's post-complaint compliance with a Clean Water Act discharge permit deprives a citizen plaintiff of standing to enforce violations that were ongoing when the plaintiff filed the complaint?

II. Whether, in an action to enforce a Clean Water Act discharge permit, the expiration of that permit and the issuance of a new permit necessarily moots the citizen plaintiff's claim?

INTEREST OF THE UNITED STATES

The United States, with the states, implements and has the lead role in enforcing the Clean Water Act ("Act" or "CWA"), 33 U.S.C. § 1251 et seq. Congress also has authorized affected persons to enforce many of the Act's requirements. Such "citizen suits" allow persons who are or may be injured by violations to protect their health, environmental, and other interests, and encourage compliance with the Act. Because resource limitations do not allow the government to pursue all violations that warrant enforcement, the United States has a strong interest in ensuring that citizens may enforce the Act to the full extent intended by Congress and allowed by the Constitution.

SUMMARY OF ARGUMENT

The recent decision in Steel Company v. Citizens for A Better Environment, 118 S. Ct. 1003 (1998), does not undermine standing in this case. A defendant's post-complaint compliance with the law cannot deprive a citizen

plaintiff of standing, because under a long line of unquestioned precedent, standing depends upon the facts that existed when the complaint was filed. While a case or controversy must exist at all stages in the litigation, courts evaluate post-complaint changes in fact and law through the mootness doctrine, rather than by revisiting standing.

The United States takes no position on whether the particular facts of this case render the controversy moot, but notes that, as a rule, voluntary, post-complaint cessation of illegal activity does not render a claim moot unless the defendant carries its "heavy burden" of proving that the post-complaint change makes "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., 484 U.S. 49, 66 (1987) (quoting United States v. Concentrated Phosphate Export Ass'n, 393 U.S. 199, 203 (1968)). One factor a court should consider in deciding whether the defendant has met that burden is whether the defendant would have a financial incentive to resume its illegal conduct. The mere fact that the district court decided not to issue an injunction does not demonstrate that this case is moot. Both injunctive relief and civil penalties may redress the prospect of future violations through specific deterrence. Thus, prayers for both types of relief may support Article III jurisdiction, even where a court denies one or both forms of relief on the merits.

ARGUMENT

I. Laidlaw's Post-Complaint Compliance Is Not Relevant to FOE's Standing, Because Standing Is Evaluated Based on the Facts at the Time of the Complaint.

A. Standing Turns on the Facts as They Existed at the of Time the Complaint, While Post-Complaint Factual Developments Go to Mootness.

Article III limits the judicial power of federal courts to "cases" or "controversies." This requirement serves to "limit the business of the federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process" and also "to assure that the federal courts will not intrude into areas committed to other branches of government." Flast v. Cohen, 392 U.S. 83, 95 (1968). One aspect of the case-or-controversy requirement is the doctrine of standing, under which a plaintiff seeking to invoke the jurisdiction of a federal court must show either a present or threatened future "injury in fact" that is "causal[ly] connect[ed]" to the challenged conduct and that "likely" would be redressed by a favorable decision. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (emphasis omitted).

The facts that must be alleged, supported, and ultimately proven to support standing are the facts as they existed at the time the plaintiff filed its complaint and sought to trigger the court's jurisdiction. See, e.g., Lujan., 504 U.S. at 569 n.4; County of Riverside v. McLaughlin, 500 U.S. 44, 50-51 (1991); Gwaltney of Smithfield v. Chesapeake Bay

Found., 484 U.S. 49, 69 (1987) (Scalia, J., concurring in part and in the judgement); cf. Allen v. Wright, 468 U.S. 737, 751-52 (1984) ("In most cases the standing question can be answered chiefly by comparing the allegations of the particular complaint to those made in prior standing cases." (emphasis added)); O'Shea v. Littleton, 414 U.S. 488, 496 (1974) (holding that plaintiffs lacked standing where "[n]either the complaint nor respondents' counsel suggested that any of the named plaintiffs at the time the complaint was filed were themselves serving an allegedly illegal sentence or were on trial or awaiting trial before petitioners." (emphasis added)); Smith v. Sperling, 354 U.S. 91, 93 n. 1 (1957); St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U.S. 283, 289-90 (1938).

The Article III case-or-controversy requirement subsists "through all stages of federal judicial proceedings," Lewis v. Continental Bank Corp., 494 U.S. 472, 477, 478 (1990) (internal quote marks omitted), but post-complaint changes in the facts or law that may eliminate any "case" or "controversy" are uniformly assessed through the lens of mootness rather than standing. See, generally Los Angeles County v. Davis, 440 U.S. 625, 631 (1979) ("[J]urisdiction, properly acquired, may abate if the case becomes moot *** ." (internal quote marks and citations omitted)); Carr v. Alta Verde Industries, Inc., 931 F.2d 1055, 1061 (5th Cir. 1991); 13A C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure ¶3533, at 211 (2d ed. 1984). The cases that evaluate post-complaint developments under the mootness rubric are numerous and unquestioned. See, e.g., Spencer v. Kemna, 118 S. Ct. 978, 983 (1998). For example, in County of Riverside v. McLaughlin, 500 U.S. 44, 50-52 (1991), the Court held that the plaintiff had standing even though, as a result of post-complaint developments, the case was moot.

Likewise, in Arizonans for Official English v. Arizona, 117 S. Ct. 1055 (1997), a state employee sued the state to challenge a state law that she believed required her to speak English at work. While the case was on appeal, the plaintiff left state employment, and the Supreme Court determined that her challenge was "moot." Id. at 1068-69.[1] And in Gwaltney, after addressing standing, the Supreme Court invoked the mootness doctrine as the right tool for resolving the defendant's concern that citizens should not "press their suit to conclusion" where the "allegations of ongoing noncompliance become false at some later point in the litigation." 484 U.S. at 66-67.

Mootness and standing have common origins and related contours. Allen v. Wright, 468 U.S. 737, 750, 104 S. Ct. 3315, 3324 (1984). The Supreme Court has on occasion described mootness "'as the doctrine of standing set in a time

frame.'" Arizonans for Official English, 117 S. Ct. at 1068-69 (quoting United States Parole Comm'n v. Geraghty, 445 U.S. 388, 397 (1980)).[1] But while the contours of these two doctrines sometimes overlap, the Supreme Court has consistently inquired whether post-complaint changes deprive the court of jurisdiction through the "mootness," not the "standing," lens. Steel Company specifically recognized and implicitly reaffirmed this distinction, in holding that an exception to the mootness doctrine did not apply to the standing inquiry. See 118 S. Ct. at 1020; see also Burke v. Barnes, 479 U.S. 361, 364 n.*, 107 S. Ct. 734, 736 n.* (1987) ("We reject respondents' argument that the questions of mootness and standing are necessarily intertwined.").

B. Laidlaw's Post-Complaint Compliance Is Irrelevant to FOE's Standing.

FOE did not "lose standing" once Laidlaw came into compliance with the company's 1986 permit. As discussed supra, a plaintiff's standing depends on the facts that existed when the plaintiff filed its complaint. FOE filed its complaint on June 12, 1992, and joined Sierra Club as a plaintiff on November 19, 1992. 956 F. Supp. at 592. Laidlaw violated its permit limits for mercury fourteen times in June 1992, including on the very day the complaint was filed and on several subsequent days during that month, and

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1 The Supreme Court sometimes even has incorporated the tripartite standing test into the mootness inquiry. See, e.g., Spencer v. Kemna, 118 S. Ct. 978, 983 (1998) (Scalia, J.). Compare United States Parole Comm'n v. Geraghty, 445 U.S. 388, 403 (1980) (using a test specific to the mootness inquiry).

violated its mercury limit on at least six more days in the following four months. Id. at 621. Laidlaw substantially reduced its violations shortly after FOE sued, see id. at 611, but did not consistently comply with its permit limit for mercury discharges until 1995. Ibid. Thus, Laidlaw did not "come into compliance with the 1986 permit" until after FOE sued, and Laidlaw's post-complaint compliance is inapposite to FOE's standing. Put another way, if FOE had standing on the facts as they existed when FOE filed its complaint, no subsequent change in the facts — not even Laidlaw's post-complaint compliance — could eliminate that standing. The Steel Company Court's recognition of the difference between mootness and standing, see 118 S. Ct. at 1020, buttresses this conclusion.

II. The Issuance of the 1993 and 1994 Permits Did Not Necessarily Moot This Case.

A. A Defendant's Voluntary, Post-Complaint Cessation of Illegal Activity Does Not Moot a Case Unless the Defendant Proves That the Wrongful Behavior Could Not Reasonably Be Expected to Recur.

1. The Defendant Carries the Burden of Demonstrating that Post-Complaint Compliance Moots a Plaintiff's Suit.

A case becomes moot "'when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome.'" United States Parole Commission v. Geraghty, 445 U.S. 388, 395-96 (1980) (quoting Powell v. McCormack, 395 U.S. 486, 496 (1969)). The mootness doctrine, like that of standing, derives from the Article III

case-or-controversy requirement, but the two are not the same:

> [W]hile the initial burden of establishing the trial court's jurisdiction rests on the party invoking that jurisdiction, once that burden has been met courts are entitled to presume, absent further information, that jurisdiction continues. If a party to an appeal suggests that the controversy has, since the rendering of judgment below, become moot, that party bears the burden of coming forward with the subsequent events that have produced that alleged result.

Cardinal Chemical Co. v. Morton Int'l., Inc., 508 U.S. 83, 98 (1993).

In keeping with this shifted burden, the Supreme Court long has recognized that a defendant who voluntarily halts challenged conduct only after being sued generally does not thereby "deprive the tribunal of power to hear and determine the case." United States v. W. T. Grant Co., 345 U.S. 629, 632 (1953); accord City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 289 (1982); United States v. Concentrated Phosphate Export Ass'n, 393 U.S. 199, 203 (1968). Rather, a defendant who seeks to moot a lawsuit by voluntarily halting challenged activity only after being sued must carry the "heavy burden" of showing "that it is absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." Gwaltney, 484 U.S. at 66 (emphasis in original; internal quote marks omitted); accord, e.g., Chesapeake Bay Foundation, Inc. v. Gwaltney of Smithfield, Ltd., 890 F.2d 690, 697 (4th Cir. 1989); American Iron & Steel Inst. v. Environmental Protection Agency, 115 F.3d 979, 1007 (D.C. Cir. 1997). This rule

"protects plaintiffs from defendants who seek to evade sanction by predictable protestations of repentance and a reform," Gwaltney, 484 U.S. at 67, while promoting judicial economy and fairness. As the Third Circuit has explained:

> A citizen suit would lose much of its effectiveness if a defendant could avoid paying any penalties by post-complaint compliance. *** [P]olluters would be encouraged to delay litigation as long as possible, knowing that they will thereby escape liability even for post-complaint violations, so long as violations have ceased at the time the suit comes to trial. Moreover, whether or not damage claims are mooted would depend on the vagaries of when the district court happens to set the case for trial.

Natural Resource Defense Council v. Texaco Ref. & Mktg., Inc., 2 F.3d 493, 503 (3d Cir. 1993) (citations and quotations omitted).

Steel Company supports application of the "voluntary cessation" mootness rule to this case. The Steel Company Court declined to extend the "voluntary cessation" rule to support a claim of standing where the plaintiff did not allege any likelihood of future violations. See 118 S. Ct. at 1020. But Steel Company preserved without questioning the long-standing application of the voluntary cessation rule "to refute the assertion of mootness by a defendant who, when sued in a complaint that alleges present or threatened injury, ceases the complained-of activity." Ibid. This is such a case.

The question whether Laidlaw's present compliance moots any controversy with respect to future violations turns on two subsidiary questions: First, is Laidlaw's post

-complaint compliance attributable solely to a permanent change in the law (i.e., the change in Laidlaw's 1994 permit), or did Laidlaw's post-complaint compliance result at least in part from Laidlaw's "voluntary cessation" of illegal activity after FOE sued? If "voluntary cessation" was a factor, then the voluntary cessation doctrine applies. The United States leaves that fact-specific inquiry to the parties. Second, if Laidlaw's compliance was attributable at least in part to Laidlaw's "voluntary cessation" of illegal activity, has Laidlaw proved that its violations cannot reasonably be expected to recur? If Laidlaw has not carried that burden, this case remains "live."

2. Mere "Protestations of Repentance and Reform" Do Not Demonstrate That A Controversy Is Moot.

In evaluating whether a defendant has carried its heavy burden of demonstrating that violations cannot reasonably be expected to recur, one factor a court should consider is whether the defendant would have an incentive to resume its illegal activity — especially any economic incentive like one the defendant may have had immediately before the complaint — if the case (and the accompanying imminent threat of sanctions) were dismissed. Cf. Concentrated Phosphate Export Ass'n, 393 U.S. at 202-03 (holding that the defendants' mere assertion that the prior illegal practice was no longer economical did not suffice to moot an enforcement action). Where a defendant has a direct financial incentive to resume conduct that is illegal, cessation of illegal activity — even if accompanied by a substantial period of compliance during the lawsuit — is unlikely to be sufficient to make "absolutely clear" that there is "no reasonable expectation that the wrong will be repeated." See Gwaltney, 484 U.S. at 66-67; see also W.T. Grant Co., 345

U.S. at 632-33; cf. Gwaltney, 484 U.S. at 69 (Scalia, J., concurring in part and in the judgement) ("A good or lucky day is not a state of compliance. Nor is the dubious state in which a past effluent problem is not recurring at the moment but the cause of that problem has not been completely and clearly eradicated.").

3. The Denial of An Injunction Is Not Equivalent to A Factual Finding that the Controversy Is Moot.

The district court's decision not to enjoin Laidlaw does not necessarily mean that Laidlaw had carried its burden of proving mootness. The district court correctly recognized that "a defendant in substantial compliance with its NPDES permit is not required to show that there is no chance of future permit violations in order to defeat a request for injunctive relief." 956 F. Supp. at 611. Abandonment of illegal activity "is an important factor bearing on the question whether a court should exercise its power to enjoin the defendant from renewing the practice, but that is a matter relating to the exercise rather than the existence of judicial power." City of Mesquite, 455 U.S. at 289. Thus, even in cases in which a court determines that an injunction is inappropriate, claims regarding future violations generally are not mooted by a defendant's "voluntary cessation" of illegal activity. See Concentrated Phosphate Export Ass'n, 393 U.S. at 203; W.T. Grant Co., 345 U.S. at 633-34, 635-36 ("We conclude that, although the actions were not moot, no abuse of discretion has been demonstrated in the trial court's refusal to award injunctive relief."); see also Illinois Central R.R. Co. v. Adams, 180 U.S. 28, 30-32 (1901) (reasoning that the court had jurisdiction, despite the respondent's argument that

"the very things the bill was filed to prevent are accomplished facts, and the [petitioner] cannot be injured," because those "accomplished facts" went to the merits rather than to jurisdiction). Steel Company reaffirmed that Article III redressability turns on the relief the plaintiff requests — unless the request is wholly frivolous — even if the court ultimately dismisses the case on the merits. 118 S. Ct. at 1010; see also Bell v. Hood, 327 U.S. 678, 682-83 (1946); Binderup v. Pathe Exchange, Inc., 263 U.S. 291, 305-06 (1923).

B. Both An Injunction Against Future Violations And An Award of Civil Penalties May Redress Injuries From Threatened Future Violations.

Both injunctions and civil penalties deter threatened future violations by a defendant, and thereby redress injuries from those threatened future violations. The Steel Company Court recently reiterated that the deterrent effect of an order regarding future compliance satisfies the Article III standing requirement for redressability where the plaintiff alleges a continuing violation or the imminence of a future violation. Steel Co., 118 S. Ct. at 1019. Thus, if FOE has an injury from the threat of Laidlaw's future violations, that injury would be redressed by an injunction against Laidlaw.

Civil penalties also would redress injuries from threatened future violations, by deterring those future violations. As the Supreme Court has noted, injunctions are not the only means of obtaining compliance with the Clean Water Act — penalties also can specifically deter future violations by a defendant. Weinberger v. Romero-Barcelo, 456 U.S. 305, 314 (1982); see also Tull v. United States, 481 U.S. 412, 422-23 (1987) (citing 123 Cong. Rec. 39191

(1977)) ("Congress wanted the district court to consider the need for retribution and deterrence, in addition to restitution, when it imposed civil penalties [under the Clean Water Act]."). It was for this reasons that Congress empowered district courts to "seek to deter future violations by basing the penalty on its economic impact." Tull, 481 U.S. at 423.

Relying on language in Steel Company, Laidlaw argues that civil penalties cannot redress a citizen's injuries because penalties are paid to the Treasury and any deterrent effect is not cognizable under Article III. See Laidlaw's 2d Supp. Br. 4. Laidlaw's argument misreads Steel Company, which stated that the plaintiff's prayer for penalties, in a complaint that did not allege future violations, "seeks not remediation of [plaintiff's] own injury *** but vindication of the rule of law — the 'undifferentiated public interest' in faithful execution of EPCRA." 118 S. Ct. at 1018.

> This does not suffice. Justice Stevens thinks it is enough that respondents will be gratified by seeing petitioner punished for its infractions and that the punishment will deter the risk of future harm. * * * [S]uch a principle would make the redressability requirement vanish. By the mere bringing of the suit, every plaintiff demonstrates his belief that a favorable judgment will make him happier. But although a suitor may derive great comfort and joy from the fact that the United States Treasury is not cheated, that a wrongdoer gets his just deserts, or that the nation's laws are faithfully enforced, that psychic satisfaction is not an acceptable Article III remedy because it does not redress a cognizable Article III injury.

118 S. Ct. at 1018-19.

This language must be read in light of Steel Company's facts and other aspects of the opinion. The Supreme Court explicitly decided Steel Company on the basis that the plaintiff had not alleged a threat of future violations. Id. at 1019, 1020. It was obvious that penalties could not deter continuing or future violations by the defendant: There were no continuing or future violations by the defendant to deter. On those facts, the only deterrent effect that penalties could have had would have been to deter violations by the population at large — speculative violations by unknown, unrelated persons who might never cause the plaintiffs any injury. Consistent with longstanding principles of standing, the Steel Company Court rejected the notion that such an indistinct possibility satisfies the standing doctrine's injury-in-fact requirement, reasoning that the "great comfort" that a plaintiff may receive from knowing "the nation's laws are faithfully enforced" simply "is not an acceptable Article III injury." Id. at 1019.

The fact that Article III is not satisfied by the chance that penalties may generally deter speculative violations that have not even been alleged cannot be read as a rejection of the concept that specific deterrence provides cognizable redress for a plaintiff's injury from continuing or future violations by the defendant. Steel Company specifically reaffirmed that, "[i]f respondent had alleged a continuing violation or the imminence of a future violation," then judicial relief designed to deter a future violation "would remedy that alleged harm." 118 S. Ct. at 1019 . While the Court made this statement in discussing injunctive relief, the Court has always recognized that penalties and the threat of penalties, including Clean Water Act penalties, specifically deter misconduct by persons who are, or may be, penalized. See, e.g., Tull, 481 U.S. at 423; Romero-Barcelo, 456 U.S. at 314 ("An injunction is not the only means of ensuring

compliance. The [Clean Water Act] itself, for example, provides for fines and criminal penalties."); accord Texaco Refining, 2 F.3d at 503 n. 9 ("Citizens file actions primarily to deter future violations by the named defendant and by other potential polluters, and the imposition of penalties significantly enhances the deterrent effect of a citizen suit."). If violators "faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality." Albemarle Paper Co. v. Moody, 422 U.S. 405, 417 (1975). That is because the deterrent effect of even injunctions depends partly on the penalties that may give those injunctions teeth.[2] Penalties specifically deter future illegal activity by a defendant, and under Steel Company's reasoning, specific deterrence may redress injuries caused by the threat of a defendant's future violations.[3] Steel Company's holding — that some possible general deterrent effect on the world at large does not cognizably redress injuries from past violations — does not implicitly overrule the established law that penalties do specifically deter, or Steel Company's clear statement that specific deterrence is

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2 Similarly, declaratory relief would specifically deter future violations. A declaration that Laidlaw had violated the Clean Water Act could subject it to increased penalties if it committed violations again. 33 U.S.C. § 1319(d).

3 Indeed, this case seems to illustrate that principle: Laidlaw did not come into compliance until faced with the concrete prospect of penalties from the state and citizen enforcement actions.

adequate Article III redress for continuing or threatened future violations.[4]

CONCLUSION

A defendant's post-complaint compliance does not deprive a citizen plaintiff of standing, because standing depends upon the facts as they were when the complaint was filed. Post-complaint voluntary cessation of illegal activity moots a citizen plaintiff's claims for prospective relief only where the defendant carries the heavy burden of proving that the change makes absolutely clear that the wrongful behavior could not reasonably be expected to recur.

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4 Five courts of appeals have unanimously rejected the argument that post-complaint compliance strips a federal court of jurisdiction to hear a Clean Water Act plaintiff's claims for civil penalties for violations that were continuing at the time the plaintiff filed suit. See Comfort Lake Assoc., Inc. v. Dresel Contracting, Inc., 138 F.3d 351, 356 (8th Cir. 1998); Atlantic States Legal Found. v. Stroh Die Casting Co., 116 F.3d 814, 820 (7th Cir. 1997); Natural Resource Defense Council v. Texaco Ref. & Mktg., Inc., 2 F.3d 493, 503-04 (3rd Cir. 1993); Atlantic States Legal Found. v. Tyson Foods, Inc., 897 F.2d 1128, 1135 (11th Cir. 1990); Pawtuxet Cove Marina, Inc. v. Ciba-Geigy, Corp., 807 F.2d 1089, 1091 (1st Cir. 1986); see also Molokai Chamber of Commerce v. Kukui (Molokai), Inc., 891 F. Supp. 1389, 1406 (D. Hawaii 1995); Save Our Bays & Beaches v. City and County of Honolulu, 904 F. Supp. 1098, 1119 (D. Haw. 1994).

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No. 86-473

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

GWALTNEY OF SMITHFIELD, LTD.,
Petitioner,

v.

CHESAPEAKE BAY FOUNDATION, INC.,
and
NATURAL RESOURCES DEFENSE COUNCIL,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR PETITIONER

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Permitting Citizen Suits For Purely Past Violations Would Contravene The Constitution

1. We agree with the Solicitor General that if the citizen suit provision were interpreted to permit citizen penalty actions for wholly past violations, it would violate the constitutional standing requirements of Article III. Gov. Br. 21-22 n.34. To satisfy Article III, a plaintiff must show not only an injury to himself but also that the injury "is likely to be redressed by a favorable decision." *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38 (1976). Even if a citizen plaintiff can show that he was injured by past

violations, penalties payable only to the Treasury cannot redress those injuries to that plaintiff.

"'The necessity that the plaintiff who seeks to invoke judicial power stand to profit in some personal interest remains an Art. III requirement.'"[21] Because respondents sued on the basis of purely past violations, App. 7a, 17a, they could not and did ont obtain the injunction they sought barring future violations. App. 83a. Damages are never recoverable under the Act. *Middlesex County*, 453 U.S. at 18, 21. The redressability requirement of Article III cannot be satisfied by any interest in general deterrence or law enforcement, no matter how keenly held, *Diamond v. Charles*, 106 S.Ct. 1697, 1706 (1986), nor by recovery of attorney's fees and costs.[22] While it would appear that penalties payable to the Treasury can *never* redress injury to citizen plaintiffs, it is certain that at least in the case of "citizen suits like the one at bar, seeking civil penalties for permit violations committed entirely in the past," App. 17a, the plaintiff does not and cannot "stand to profit in some personal interest" sufficient to satisfy Article III. *Allen v. Wright*, 468 U.S. at 766.

We also agree with the Solicitor General that permitting citizens to seek penalties for purely past violations would intrude upon the Executive's responsibility to "take Care that the Laws be faithfully executed," U.S. Const. Art. II § 3.

21*Allen v. Wright*, 468 U.S. 737, 766 (1984) (quoting *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. at 39).

22*Id.* at 1708; *White v. New Hampshire Dept. of Employment Security*, 455 U.S. 455, 452 (1982).

Gov. Br. 21-22 n. 34[23] Such an interpretation would allow any unaccountable citizen to engage in the essentially prosecutorial function of punishing permit holders for past violations. *See Tull v. United States*, 107 S.Ct. 1831, 1838 (1987).

2. Respondents do not even address these concerns, arguing that the constitutional issues are not before the Court.[24] Interpreting the statute as urged by Gwaltney would indeed avoid the necessity of reaching the constitutional issues in this case. The Court would simply hold that Gwaltney's motion to dismiss should have been granted, because the citizen plaintiffs sought penalties that the statute did not authorize. If the Court accepts respondents' view of the statute, however, it must address and resolve the constitutional arguments. Questions of Article III standing can never be waived, and this Court has an obligation to satisfy itself that the requirements of Article III have been met in every case before it.[25]

23*See* Brief of Amici Curiae Bethlehem Steel Corporation, et al.; Brief of Amicus Curiae Rollins Environmental Services (NJ) Inc.

24Resp. Br. 9 n.4. Respondents do include a cursory citation to United States ex rel. Marcus v. Hess, 317 U.S. 537 (1943), as the "full answer" to the constitutional concerns. That case is wholly beside the point, since the statute at issue there granted the citizen plaintiff half of any damages recovered. *See id. at 540.* Damages are not recoverable in citizen suits under the Clean Water Act, and all penalties go to the Treasury.

25"'This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it.'" *Bender v. Williamsport Area School Dist.*, 106 S. Ct. 1326, 1334 (1986) (quoting *Mansfield C. & L.M.R. Co. v. Swan*, 111 U.S. 379, 382 (1884)).

3. The Government recognizes that an ongoing violation is an Article III predicate to a constitutional citizen suit, but then suggests that Article III redressability concerns are satisfied when the citizen plaintiff *alleges* that he is adversely affected by an ongoing violation--even if the allegation turns out to be untrue. Gov. Br. 21 n.34. This Court, however, has repeatedly stressed that mere allegations are insufficient to meet the requirements of Article III.[26] The *facts* establishing an Article III case or controversy "must affirmatively appear in the record," and "it is not 'sufficient that jurisdiction may be inferred argumentatively from averments in the pleadings.'"[27]Here it is "undisputed" that Gwaltney's violations ceased before suit. App. 7a. Any allegations to the contrary cannot be relied upon to satisfy the redressability requirement of Article III.

Over the long run, even the Government finds its theory untenable. As the Government puts it, jurisdiction acquired on the basis of allegations may "abate," and the cessation of violations may render a case "nonjusticiable." Gov. Br. 27-28. These principles, the Government notes, "embrace core Article III concerns." *Id.* at 28. If the absence of an *ongoing* violation has constitutional significance at a *later* point in the litigation, however, it must have the same significance at the

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26*See, e.g., Warth v. Seldin*, 422 U.S. 490, 502 (1975) (plaintiffs "must allege *and show* that they personally have been injured")(emphasis supplied); *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 689 (1973) (standing allegations "must be true and capable of proof at trial"); *Los Angeles v. Lyons*, 461 U.S. 95, 107 n.8 (1983) ("It is the *reality* of the threat of repeated injury that is relevant to the standing inquiry, not the plaintiff's subjective apprehensions") (emphasis in original).

27*Bender v. Williamsport Area School Dist.*, 106 S.Ct. at 1334 (quoting *Grace v. American Central Ins. Co.*, 109 U.S. 278, 284 (1983)).

outset of the litigation. The Government simply attempts to transform the plaintiff's burden of establishing an *ongoing* violation, and thereby jurisdiction, into a burden on the defendant to prove the absence of an ongoing violation and the lack of jurisdiction. If one thing is clear, however, it is that since it is the plaintiff who "is seeking relief subject to [the court's] supervision, it follows that he must carry throughout the litigation the burden of showing that he is properly in court." *McNutt v. General Motors Acceptance Corp.*, 298 U.S. at 189. Respondents failed to meet that burden.